92-1367

No. ——

Supreme Court, U.S.
FILED
FEB 16 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NEW CASTLE COUNTY,
Petitioner,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut Corporation, *et al.*,
Defendants,

and

CONTINENTAL CASUALTY COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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February 16, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

120 pp

QUESTION PRESENTED

Whether this Court should resolve the existing conflict among the circuit courts of appeals, and the conflict within the Third Circuit, regarding whether a federal court, sitting in diversity, must consider a relevant lower state court opinion, regardless of whether the lower state court's opinion is final, when that opinion is the only declaration of the applicable state's law?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were petitioner New Castle County, Delaware,* as plaintiff, and respondent Continental Casualty Company, as defendant.

Eleven other insurance company defendants in the district court either were dismissed or settled with petitioner before trial, and were not parties in the proceedings as to which petitioner seeks a writ of *certiorari*. Those companies are Hartford Accident & Indemnity Company, The Home Insurance Company, New Hampshire Insurance Company, United States Fire Insurance Company, Insurance Company of North America, Continental Insurance Company, United States Liability Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, Twin City Fire Insurance Company, Aetna Casualty & Surety Company, and Zurich Insurance Company.**

In addition, the United States Court of Appeals for the Third Circuit granted the motions to appear and file briefs as *amici curiae* of the Insurance Environmental Litigation Association, E.I. Du Pont de Nemours & Company, ICI Americas Inc., International Business Machines Corporation, Olin Corporation, The American Petroleum Institute, The American Fiber Manufacturers Association, and the Chemical Manufacturers Association.

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* Petitioner has no parent company and no subsidiaries.

** However, five of those companies (The Home Insurance Company, United States Fire Insurance Company, Insurance Company of North America, United States Liability Insurance Company, and Aetna Casualty & Surety Company), have been served with this petition, because Continental Casualty Company filed cross-claims against those companies, which were mooted by the decision as to which petitioner seeks a writ of *certiorari*.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.1 LIST	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
A. Material Facts	2
B. Procedural Background	6
1. The Initial Proceedings in the Trial Court	6
2. CNA's First Appeal	8
3. The Proceedings in the Trial Court on Remand	8
4. CNA's Second Appeal	9
REASONS FOR GRANTING THE WRIT	11
ARGUMENT	13
THIS COURT SHOULD RESOLVE THE INTER-CIRCUIT AND INTRA-CIRCUIT CONFLICTS REGARDING WHETHER, IN A DIVERSITY CASE, A CIRCUIT COURT MUST CONSIDER A RELEVANT INTERLOCUTORY LOWER STATE COURT DECISION THAT IS THE ONLY DECLARATION OF THE APPLICABLE STATE'S LAW	13
CONCLUSION	20

TABLE OF AUTHORITIES

Cases: Page

Commercial Union Ins. Co. v. Bituminous Casualty Co., 851 F.2d 98 (3d Cir. 1988), *on remand*, No. CIV. 87-325, 1989 WL 5818 (D.N.J. Jan. 25, 1989) 16
Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388 (7th Cir. 1992) 18
E.I. Du Pont de Nemours & Co. v. Admiral Insurance Co., No. 89C-AU-99 (Del. Super. Ct. Sept. 19, 1990), *motion for reconsideration denied* (Jan. 13, 1992) 15
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 13
Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940) ..... *passim*
Giguere v. United States Steel Corp., 262 F.2d 189 (7th Cir. 1959), *cert. denied*, 360 U.S. 934 (1959) 12, 17, 18
Hamme v. Dreis & Krumpf Mfg. Co., 716 F.2d 152 (3d Cir. 1983) 12, 18, 19
Hicks v. Feiock, 485 U.S. 624 (1988) 14
Lomax v. Nationwide Ins. Co., 964 F.2d 1343 (3d Cir. 1992) 16
National Union Fire Ins. Co. of Pittsburgh, Pa. v. Rhone-Poulenc Basic Chems. Co., No. 87C-SE-11 (Del. Super. Ct. Jan. 16, 1992) ..... *passim*
New Castle County v. Continental Casualty Co., 725 F. Supp. 800 (D. Del. 1989) ..... *passim*
New Castle County v. Continental Casualty Co., 728 F. Supp. 324 (D. Del. 1989) 2
New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359 (D. Del. 1987) 1, 5, 6, 7, 8
New Castle County v. Hartford Accident & Indem. Co., 685 F. Supp. 1321 (D. Del. 1988) 1, 6
New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162 (3d Cir. 1991) 2, 6, 8
New Castle County v. Hartford Accident & Indem. Co., 778 F. Supp. 812 (D. Del. 1991) 2, 9, 15
New Castle County v. Hartford Accident & Indem. Co., 970 F.2d 1267 (3d Cir. 1992) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Northern Ins. Co. v. Aardvark Assocs., Inc., 942 F.2d 189 (3d Cir. 1991)	16
Pentech Int'l, Inc. v. Wall Street Clearing Co., Nos. 92-7222, 92-7264, 1779, 1863, 1993 WL 5013 (2d Cir. Jan. 13, 1993)	12, 17
In re President and Fellows of Harvard College, 149 F.2d 69 (1st Cir. 1945)	18
Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co., 616 A.2d 1192 (Del. 1992)	16
Richardson v. United States, 841 F.2d 993 (1988), *appeal after remand*, 943 F.2d 1107 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1473 (1992)	12, 17, 18
West v. American Telephone & Telegraph Co., 311 U.S. 223 (1940)	*passim*
Williams v. First Federal Savings & Loan Association, 651 F.2d 910 (4th Cir. 1981)	12, 17
Wisniewski v. Johns-Manville Corp., 759 F.2d 271 (1985), *aff'd*, 812 F.2d 81 (3d Cir. 1987)	16
Zimmerman v. Mathews Trucking Corp., 203 F.2d 864 (8th Cir. 1953)	18, 19

Statutes:

28 U.S.C. § 1254(1) (Supp. 1992)	2
28 U.S.C. § 1332(a)(1) (Supp. 1992)	6
42 U.S.C. § 6901 *et seq.* (Supp. 1992)	5
42 U.S.C. § 9601 *et seq.* (Supp. 1992)	6

Other Authorities:

Del. Const. of 1897, Art. IV § 7	11
Del. Const. of 1897, Art. IV § 11, *as amended* (1993)	19
R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* (6th Ed. 1986)	12

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PETITION FOR WRIT OF CERTIORARI

Petitioner New Castle County ("the County") respectfully requests that a writ of *certiorari* be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in *New Castle County v. Hartford Accident & Indemnity Co.*, 970 F.2d 1267 (3d Cir. 1992) ("*New Castle VII*").

OPINIONS BELOW

The opinions of the district court on partial summary judgment motions, and after a 1989 trial of remaining factual issues, are reported at 673 F. Supp. 1359 (D. Del. 1987) ("*New Castle I*"); 685 F. Supp. 1321 (D. Del. 1988) ("*New Castle II*"); 725 F. Supp. 800 (D. Del.

1989) ("*New Castle III*"); and 728 F. Supp. 324 (D. Del. 1989) ("*New Castle IV*"). Respondent Continental Casualty Company ("CNA") appealed portions of *New Castle I* and *New Castle III*, and the decision in favor of the County in *New Castle IV*, to the Third Circuit Court of Appeals. *See New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991) ("*New Castle V*").

In *New Castle V*, the Third Circuit in 1991 affirmed the district court in part, reversed in part, and remanded the case to the district court. The district court decided in favor of the County on remand in November 1991. *See New Castle County v. Hartford Accident & Indem. Co.*, 778 F. Supp. 812 (D. Del. 1991) ("*New Castle VI*"). CNA appealed *New Castle VI* to the Third Circuit Court of Appeals, which reversed the decision of the trial court on July 28, 1992, *as amended* August 4, 1992. *See New Castle VII*, 970 F.2d at 1273. The County filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* in the Third Circuit on August 11, 1992. That petition was denied on November 18, 1992. The opinions in *New Castle VI* and *New Castle VII* are reprinted in the Appendix hereto.

JURISDICTION

This is a petition for review of the Third Circuit's July 28, 1992 decision in this diversity case. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on November 18, 1992, and this Petition for Writ of *Certiorari* was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (Supp. 1992).

STATEMENT OF THE CASE

A. Material Facts

This is an environmental insurance coverage case involving a municipal sanitary landfill. The ultimate issue is whether CNA (which sold comprehensive general lia-

bility insurance to the County), or the County's taxpayers, must pay in excess of six million dollars to clean up unexpected environmental damage caused by the landfill. The County did not know that the landfill would cause environmental pollution.

Many federal and state courts currently have similar actions pending between policyholders and insurance companies. Those actions are addressing whether standard-form liability insurance contracts, such as those at issue here, obligate the insurance companies to pay the costs to defend policyholders, and to pay policyholders' legal liability, in connection with environmental damage claims. Those actions involve important issues, and hundreds of millions, if not billions, of dollars.

The municipal landfill in this case is located in New Castle County, Delaware, at Tybouts Corner ("the Tybouts site"). The County leased the land in 1968, and designed the landfill to be a reclamation project, whereby municipal refuse was used to fill in or reclaim land that was otherwise unusable because of prior sand and gravel extraction operations. *New Castle III*, 725 F. Supp. at 803.

Delaware had no permitting requirements for landfills when the County leased the Tybouts site. Nonetheless, the County voluntarily agreed to comply with proposed draft landfill regulations, and to obtain permits from the Delaware State Board of Health ("Board of Health") and the Delaware Water and Air Resources Commission ("WARC") for the Tybouts site. *Id.* at 805.[1] Those

[1] The proposed regulations required the submission of "a series of soil borings, taken to the depth of the groundwater table and sufficient in number to give a valid indication of the underlying conditions," and other information about the site. Before these requirements, the State of Delaware ("the State") had virtually no regulations governing solid waste disposal except for general public health laws relating to control of potential nuisances, such as blowing paper, rats, and sea gulls. *Id.* at 804.

regulations did not even mention the term "leachate" (a liquid substance created when precipitation filters through a landfill). *Id.* at 804.

The design and operation of the Tybouts site was based on then-existing state-of-the-art landfill specifications. When operations began at the site, experts believed that precipitation filtration through the refuse and underlying soil layers of the site would result in the discharge of potable water from the site as the sole leachate. Pollution was not expected. *Id.* at 804.

While applying for the Board of Health and WARC permits, the County investigated the site and consulted with experts, including Delaware state officials and University of Delaware scientists. *Id.* The County relied upon those experts in the evaluation of all site information, because it had no expertise of its own in hydrogeology, soils, or water analysis. *Id.*[2] WARC reported to the County that the State thought Tybouts would be a "model" landfill. *New Castle III*, 725 F. Supp. at 805-06.

The Tybouts site was open from January 1969 through July 1971, when it became full. In accordance with the Board of Health and WARC permits, the Board of Health and WARC inspected the site on a regular basis. In addition, the Board of Health and WARC had the authority to require corrective action or to close the landfill. The County operated the Tybouts site pursuant to permits from the State for the entire period that the site was open.

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[2] The County submitted substantially more data to the State than was required to obtain permits. *New Castle III*, 725 F. Supp. at 804-05. The County drilled more soil borings than were required, either by the draft regulations or by current standards. *Id.* at 804. Some borings were drilled deeper than was required. *Id.* Based on the borings, the County's draftsmen prepared cross-section diagrams of the soil, which also were not required, to assist the State in reviewing the data. *Id.*

The permits required the University of Delaware to conduct a research and testing program to monitor groundwater quality under the site. The University regularly sent the test results to the State and the County. Throughout the period of operation, those reports indicated that leachate from the site was not contaminating groundwater under the site. In fact, the tests affirmed that groundwater under the site remained within federal drinking water standards, and the trial court found that it was "eminently reasonable for the County to conclude, based on [the University of Delaware] test results, that Tybouts posed no risk to surrounding properties." *New Castle III*, 725 F. Supp. at 815.

The County purchased two primary and two excess comprehensive general liability ("CGL") insurance policies from CNA. CNA's primary liability insurance policies were effective from August 1, 1973 to July 1, 1974, and from July 1, 1974 until January 1, 1975, respectively, and provided liability limits of $1 million per "occurrence."[3] CNA's excess liability insurance policies were effective from May 11, 1973 to July 1, 1974, and from July 1, 1974 until July 1, 1975, respectively, and provided liability limits of $5 million per "occurrence." *New Castle III*, 725 F. Supp. at 807-08.

Three actions subsequently were filed against the County which alleged bodily injury and/or property damage arising out of the operation of the Tybouts site. The first action was brought by the United States against the County and others, pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* (Supp. 1992), and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),

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[3] The CNA policies defined an "occurrence" as:

> . . . an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

New Castle I, 673 F. Supp. at 1363 n.5.

42 U.S.C. § 9601 *et seq.* (Supp. 1992). *New Castle III*, 725 F. Supp. at 808; *New Castle V*, 933 F.2d at 1173. That action was settled in 1988.

The other two actions were private actions that were filed against the County by property owners who lived near the site. Those actions were settled in 1992.

B. Procedural Background

1. *The Initial Proceedings in the Trial Court*

The County filed this action in 1985 in Delaware Superior Court against the twelve insurance companies, including CNA, which sold primary and excess CGL insurance policies to the County from the 1960's until the 1980's. The County sought a declaration that the insurance companies were obligated to pay the costs of defense, and to pay for the County's legal liability, in the three actions against the County arising out of the operation of the Tybouts site. The insurance companies removed the case to the United States District Court for the District of Delaware, which had jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) (Supp. 1992).

The trial court issued two opinions on summary judgment. *See New Castle I*, 673 F. Supp. 1359; *New Castle II*, 685 F. Supp. 1321. In *New Castle I*, the trial court interpreted, under the governing Delaware law, the exception portion of the pollution exclusion clause in CNA's policies.[4] The question considered by the court was whether the exception to the pollution exclusion, for "sud-

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[4] The pollution exclusion clause in CNA's policies precludes insurance coverage for:

> bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*

New Castle I, 673 F. Supp. at 1362 n.4 (emphasis added).

den and accidental" pollution damage, applied in this case.

CNA asserted that the exception to the exclusion did not apply on the premise that the environmental damage at issue purportedly was not "sudden," because it took place, unbeknownst to the County, over a period of years.

However, in 1970, when the insurance industry sought approval from state insurance commissioners to include the pollution exclusion in CGL insurance policies, the insurance industry represented that the exclusion was aimed at intentional pollution, and was merely a clarification of the policy definition of "occurrence," which excluded insurance coverage only for damage that was expected or intended from the standpoint of the policyholder. *New Castle I*, 673 F. Supp. at 1363.[5]

Thus, CNA's contention that the exclusion precluded coverage for unexpected gradual pollution was inconsistent with the insurance industry representations to insurance commissioners when the pollution exclusion was approved for use in CGL insurance policies. The trial court, therefore, interpreted the phrase "sudden and accidental" to be consistent with the "occurrence" definition and to mean "unexpected and unintended." *Id.* at 1364.

Prior to trial, all defendants, except CNA, either were dismissed from the action or settled with the County. A seven-day bench trial was held in June of 1989. The trial court ruled that CNA had a duty to pay the costs of the County's defense in the three actions against the County. The trial court also ruled that CNA had a duty to pay for the County's legal liability in the United

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[5] As noted above, the CNA policies defined an "occurrence" as:

> . . . an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

Id. at 1363 n.5.

States' action against the County. *New Castle III*, 725 F. Supp. at 820.[6] Additionally, the trial court reiterated its prior ruling in *New Castle I* that the pollution exclusion did not bar coverage for unexpected gradual pollution, and found that covered "occurrences" took place during CNA's policy periods. *Id.* at 813-16. CNA then appealed the trial court's rulings.

2. *CNA's First Appeal*

CNA appealed the trial court's ruling concerning the pollution exclusion clause. In *New Castle V*, the Third Circuit affirmed the trial court's ruling that the pollution exclusion did not exclude coverage for environmental pollution as long as the policyholder did not expect or intend the damage. 933 F.2d at 1198-99.

The Third Circuit also reversed the trial court in part, ruling that the pollution exclusion clause focuses on whether the policyholder expected or intended to discharge "contaminants" or "pollutants," rather than on whether the policyholder expected or intended any property damage from such a discharge. *Id.* at 1203, 1207.

Because the trial court had focused only on the fact that the County did not expect the Tybouts site operation to cause damage, the Third Circuit remanded the case for a determination of whether the County expected to discharge "contaminants." *Id.* Accordingly, on remand, to escape its coverage obligations, CNA bore the burden of proving that the County expected or intended to discharge "contaminants" from the Tybouts site. *Id.* at 1182, 1207.

3. *The Proceedings in the Trial Court on Remand*

In June of 1991, the County and CNA proposed, and the trial court agreed, that the issue on remand could be resolved on the existing record. CNA contended that, because leachate from the Tybouts site recently had come to

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[6] The County did not seek a ruling at trial regarding the indemnity issue with respect to the two private actions. *Id.* at 819.

be considered a "contaminant," CNA's policies did not provide insurance coverage for liability resulting from that leachate. After briefing and oral argument, the trial court determined that CNA had failed to meet its burden of proof.

The trial court ruled, as a matter of Delaware law, that whether the leachate should be considered a "contaminant," within the meaning of the pollution exclusion, turned on the knowledge of what was a contaminant that existed as of the time of contract formation, not the knowledge that existed years later, when a dispute under the contracts arose. *New Castle VI*, 778 F. Supp. at 819-20. The trial court also made a factual finding that, at the time of contracting, the County did not know that the leachate released from the Tybouts site contained any "contaminants" within the meaning of CNA's policies. Accordingly, the trial court ruled that the pollution exclusion did not exclude coverage. *Id.* at 817-18. CNA appealed *New Castle VI* on December 2, 1991.

4. *CNA's Second Appeal*

After CNA filed its second appeal to the Third Circuit, but before briefing in the Third Circuit, in a comprehensive 54-page decision, the Delaware Superior Court adopted the reasoning of *New Castle VI* in an environmental insurance coverage case involving *the same Tybouts site* at issue in this case. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Rhone-Poulenc Basic Chems. Co.*, No. 87C-SE-11, slip op. at 50-51 (Del. Super. Ct. Jan. 16, 1992) ("*Rhone-Poulenc*") (reproduced in the Appendix hereto). The Delaware Superior Court ruled that the standard-form CGL insurance contract at issue in *Rhone-Poulenc*, which contains substantially the same provisions as CNA's contracts in this case, did not preclude coverage if the policyholder did not know, at the time of contracting, that the substances at issue at the Tybouts site were harmful. *Rhone-Poulenc*, No. 87C-SE-11, slip op. at 43, 49-50.

Oral argument on CNA's second appeal to the Third Circuit was held on June 18, 1992, before Circuit Judges Nygaard and Greenberg, and District Judge Pollak. In an opinion which cannot be reconciled with Delaware law as set forth in *Rhone-Poulenc*, that panel reversed the district court, without even citing *Rhone-Poulenc*.

Ignoring the recent, contrary decision in *Rhone-Poulenc*, the Third Circuit in *New Castle VII* ruled that the term "contaminants" in the pollution exclusion clause could be construed without reference to the knowledge existing at the time of contract formation and that, in this case, the exclusion precluded coverage for liability arising out of discharged leachate, even though the County did not know that the leachate contained a harmful substance (*i.e.*, a contaminant) until well after CNA's policies had expired. 970 F.2d at 1271-73.

Thus, this diversity case presents a remarkable scenario. The district court opinion, which found in the County's favor, was adopted by a Delaware state court as a correct expression of Delaware law. That opinion later was reversed by the Third Circuit, which ignored the intervening Delaware state court opinion, apparently on the ground that the opinion was interlocutory. Therefore, if this case had not been removed by the insurance companies to the federal district court from the Delaware state court, where the County originally had filed it, the County ultimately may have prevailed.

On August 11, 1992, the County filed a timely petition for rehearing in the Third Circuit. On November 18, 1992, that petition was denied. The County now seeks a writ of *certiorari* to the United States Court of Appeals for the Third Circuit.

REASONS FOR GRANTING THE WRIT

This diversity case presents an important and far-reaching issue which has given rise to a conflict among the United States Circuit Courts of Appeals, and a conflict within the Third Circuit, and which never has been addressed by this Court. That issue is whether a federal court sitting in diversity may, under *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940) (*"West"*), and *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940) (*"Fidelity Union"*),[7] completely ignore a highly pertinent state court decision, simply because that decision is interlocutory, when predicting how the highest state court would rule. In this case, the Third Circuit did just that. It failed even to mention the relevant, non-final Delaware Superior Court decision, involving the same factual circumstances, in *Rhone-Poulenc*, which cited with approval the decision then under review by the Third Circuit, and was the only relevant Delaware state court decision. Under *West* and *Fidelity Union*, where an applicable state's highest court has not yet ruled on an issue, a federal court exercising diversity jurisdiction is required to defer to the relevant rulings of state courts immediately below the state's highest court, unless there is "persuasive data" that the state's highest court would rule otherwise. *West*, 311 U.S. at 237; *accord Fidelity Union*, 311 U.S. at 177-79.

This Court has not addressed how a federal court sitting in diversity should treat non-final lower state court decisions that are the only relevant statement of state

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[7] *West* involved the deference due to an intermediate appellate state court decision. However, in *Fidelity Union*, this Court considered decisions of a New Jersey trial court, and held that *West* also applied to decisions of a trial court, where an appeal from that court is taken directly to the highest state court. *Fidelity Union*, 311 U.S. at 178-79. The Delaware Superior Court is a court of state-wide jurisdiction, and Delaware has no intermediate courts of appeal. Like the decisions in *Fidelity Union*, decisions of the Delaware Superior Court are appealed directly to the highest court of the state. *See* Del. Const. of 1897, Art. IV § 7.

law. In the absence of guidance from this Court, federal courts sitting in diversity have given conflicting treatment to such relevant, non-final lower state court decisions.

The Second, Fourth, Seventh, and Ninth United States Circuit Courts of Appeals have ruled that, even if a relevant lower state court decision is not final, *West* controls and federal courts are "not free to reject the state rule merely because it has not received the sanction of the highest state court." *West*, 311 U.S. at 236.[8] In direct contrast, the Third Circuit in this case ignored a relevant, non-final lower state court decision, in predicting how Delaware's highest court would rule. Thus, there is a conflict among the circuit courts on this issue.

Further, an earlier opinion of the Third Circuit indicates that there is a conflict on this issue even within the Third Circuit. In *Hamme v. Dreis & Krumpf Mfg. Co.*, 716 F.2d 152 (3d Cir. 1983) (*"Hamme"*), the three panel members each favored a different approach to the question, and the panel ultimately decided to give deference to a non-final lower state court opinion. *Id.* at 154-55 n.4, 157.

"One of the prime purposes of [this Court's] certiorari jurisdiction is to bring about uniformity of decisions" among the circuit courts. R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice*, § 4.4 at 197 (6th Ed. 1986). Further, where, as here, an inter-circuit conflict is accompanied by an intra-circuit conflict on a recurring issue, the reasons for granting *certiorari* become even more compelling. *Id.*, § 4.6 at 205.

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[8] See, *e.g.*, *Pentech Int'l, Inc. v. Wall Street Clearing Co.*, Nos. 92-7222, 92-7264, 1779, 1863, 1993 WL 5013 at *4, *5 (2d Cir. Jan. 13, 1993) (*"Pentech"*); *Williams v. First Federal Savings & Loan Association*, 651 F.2d 910, 927 n.37 (4th Cir. 1981) (*"Williams"*); *Giguere v. United States Steel Corp.*, 262 F.2d 189, 193 (7th Cir. 1959), *cert. denied*, 360 U.S. 934 (1959) (*"Giguere"*); *Richardson v. United States*, 841 F.2d 993, 996 (1988), *appeal after remand*, 943 F.2d 1107 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1473 (1992) (*"Richardson"*).

The appropriate treatment by federal courts sitting in diversity of relevant interlocutory precedent from lower state courts is fundamental to the federal system of government. The issue of when, or under what circumstances, a federal court is obligated to consider a rule of law adopted by a lower state court is a frequent, and often critical, issue in diversity cases. This Court should provide guidance to the circuit courts on this issue in order to alleviate the injustice caused by existing practices, which often result in federal court decisions on issues of state law that are inconsistent with lower state court decisions. Thus, a party may obtain a different result on the same issue of state law, depending on whether the party is litigating in federal or state court. That is precisely what happened here and is the very result that this Court was seeking to avoid by its decisions in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938) (*"Erie"*), *West*, and *Fidelity Union*. 311 U.S. at 237; 311 U.S. at 177-78.

ARGUMENT

THIS COURT SHOULD RESOLVE THE INTER-CIRCUIT AND INTRA-CIRCUIT CONFLICTS REGARDING WHETHER, IN A DIVERSITY CASE, A CIRCUIT COURT MUST CONSIDER A RELEVANT INTERLOCUTORY LOWER STATE COURT DECISION THAT IS THE ONLY DECLARATION OF THE APPLICABLE STATE'S LAW

In *Erie*, 304 U.S. at 78-80, this Court held that federal courts in diversity cases must apply state law as expressed by the state's highest court. Two years later, this Court held that, in the absence of relevant precedent from the state's highest court, a federal court sitting in diversity must defer to relevant final precedent from the state courts immediately below the state's highest court, unless there is "persuasive data" that the state's highest court would rule otherwise:

> There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which

> are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances *a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court*, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and *it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule*[.]

West, 311 U.S. at 236-37 (emphasis added, citations omitted); *Fidelity Union*, 311 U.S. at 177-79. *See also Hicks v. Feiock*, 485 U.S. 624, 630 (1988).

In reaching its decision in this case, the Third Circuit ignored the highly relevant, non-final Delaware Superior Court decision in *Rhone-Poulenc*.

In *Rhone-Poulenc*, the Delaware Superior Court interpreted a standard-form insurance contract, which contained substantially the same provisions as those that are at issue here, under analogous facts. Indeed, the *Rhone-Poulenc* court considered whether insurance companies were required, under their standard-form CGL insurance policies, to pay the costs of Rhone-Poulenc's defense for one of the very same actions at issue here—an action filed by the United States against the policyholder in *Rhone-Poulenc*, as well as the County, concerning environmental damage from the Tybouts site. No Delaware Supreme Court decision has addressed these issues.

In its complaint at issue in *Rhone-Poulenc* and in this case, the United States alleged that "known carcinogens" were contained in Rhone-Poulenc's waste and were deposited at the Tybouts site. *Rhone-Poulenc*, No. 87C-SE-11, slip op. at 50. The Delaware Superior Court found that the insurance companies had a duty to pay the costs of Rhone-Poulenc's defense in that action, because "the [underlying] complaint simply does not demonstrate that [Rhone-Poulenc] expected or intended to discharge a

pollutant into or upon the land or any watercourse or body of water[.]" *Id.* at 47.

Rhone-Poulenc was decided prior to the argument to the Third Circuit in this case. It expressly adopted the reasoning of the *New Castle VI* ruling, that insurance coverage for environmental damage is not barred under a CGL insurance policy unless, at the time of contracting, the substance that was discharged was known to be a "contaminant":

> This factor is significant in light of the District Court's conclusion [in *New Castle VI*] that the parties' understanding of the term "contaminant" was *determined by what was recognized as a contaminant at the time the contract was made. New Castle County v. Hartford Acc. & Indem. Co.*, C.A. No. 85-436-JLL, slip op. at 17 (D.Del. Nov. 4, 1991). The court noted that "the risk that a certain substance will later be discovered to be a pollutant is not reasonably foreseeable, it is not the kind of risk that is normally understood to be placed on the insured.["]

Id. at 50 n.46 (emphasis added).[9]

Instead of following *Rhone-Poulenc*—or, indeed, even considering it—the Third Circuit simply ruled that whether the leachate discharged from Tybouts should be considered a "contaminant," under the pollution exclusion clause, should be determined based upon the current understanding of what constitutes a contaminant, rather than upon the understanding of what constituted a contaminant at the time the contracts were executed. *New Castle VII*, 970 F.2d at 1272. As a result of the Third

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[9] Similarly, in *E.I. Du Pont de Nemours & Co. v. Admiral Insurance Co.*, No. 89C-AU-99 (Del. Super. Ct. Sept. 19, 1990), *motion for reconsideration denied* (Jan. 13, 1992) (*"Du Pont"*), the Delaware Superior Court denied the summary judgment sought by the insurance companies, because there were disputed issues of fact as to whether the substances released were known "pollutants," or simply substances used in Du Pont's active manufacturing operations. *Id.*, slip op. at 9-10.

Circuit's apparent determination that it was entitled to ignore *Rhone-Poulenc*, the County was held to have no insurance coverage for its liability arising out of the Tybouts site.

The *Rhone-Poulenc* decision, although not final, remains the law of the case in that pending litigation. Further, there is no indication that the Delaware Supreme Court would rule contrary to the decision in *Rhone-Poulenc*.[10] Accordingly, under *West* and *Fidelity Union*, the Third Circuit was not entitled to ignore the *Rhone-Poulenc* decision simply because the lower state court decision is not final.[11]

West and its companion cases involved lower state court decisions that were final. This Court has not yet resolved whether federal courts sitting in diversity are required, under *West* and *Fidelity Union*, to consider relevant lower state court decisions that are not final at the time of the federal court's decision when there is no ruling from the state's highest court. There is a conflict among the decisions of the circuit courts that have been presented with this situation.

The Second, Fourth, Seventh, and Ninth Circuits have followed relevant, non-final lower state court decisions

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[10] Indeed, the Delaware Supreme Court previously accepted an interlocutory appeal regarding another issue decided in *Rhone-Poulenc*, and affirmed the Delaware Superior Court's ruling on that issue. *See Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192 (Del. 1992).

[11] The Third Circuit's decision to ignore *Rhone-Poulenc* is assumed to be based on the interlocutory status of that decision, since the Third Circuit previously has considered final lower state court decisions in situations where the applicable state's highest court had not ruled. *See, e.g., Lomax v. Nationwide Ins. Co.*, 964 F.2d 1343, 1345, 1347 (3d Cir. 1992); *Northern Ins. Co. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 192 (3d Cir. 1991); *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (1985), *aff'd*, 812 F.2d 81 (3d Cir 1987); *Commercial Union Ins. Co. v. Bituminous Casualty Co.*, 851 F.2d 98, 100-01 (3d Cir. 1988), *on remand*, No. CIV. 87-325, 1989 WL 5818 (D.N.J. Jan. 25, 1989).

under *West* and *Fidelity Union*.[12] By contrast, as shown above, the Third Circuit completely ignored a relevant interlocutory decision of the applicable state's lower court.[13]

In the recent *Pentech* decision, the Second Circuit, citing *West*, followed a relevant decision of a lower state court, despite the fact that the state court proceeding had not yet resulted in a final judgment. *Id.* at *4.

Additionally, the Fourth Circuit followed an interlocutory decision of a Virginia trial court in *Williams*. 651 F.2d at 927 n.37. Moreover, the Fourth Circuit followed the holding of the Virginia Circuit Court despite the fact that an appeal was pending in that case to the Virginia Supreme Court:

> It is only the [lower state court] case's lack of finality because of the pending appeal which prevents us from giving preclusive effect in this matter of state law. However, for the reasons we have advanced, the case appears to have been rightly decided.

Id. (citing *West* and its companion cases).

Similarly, in *Giguere*, the Seventh Circuit applied the decision of an Illinois appellate court, despite having been informed that discretionary review had been granted by the Illinois Supreme Court:

> On oral argument, counsel informed us that the Supreme Court of Illinois has permitted an appeal in the Rylander case. Nevertheless, we do not feel it advisable that we should hold up the decision of the case at bar until such time as the Illinois Supreme Court may decide the Rylander appeal. We do not

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[12] *See, e.g., Pentech*, at *4; *Williams*, 651 F.2d at 927 n.37; *Giguere*, 262 F.2d at 193; *Richardson*, 841 F.2d at 996.

[13] It is unclear whether other circuits also have taken this approach. Absent an express statement by a court that it is not considering a relevant lower state court decision on the ground that it is interlocutory, there is no reasonable way to determine whether other courts also have ignored relevant interlocutory lower state court opinions.

> know of any persuasive data which would lead us to believe that the Illinois Supreme Court would reverse the Rylander decision. West v. American Telephone & Telegraph Company, 311 U.S. 223, 236, 237, 61 S.Ct. 179, 85 L.Ed. 139.

262 F.2d at 193. The court thus determined that, absent persuasive data indicating that the highest state court would rule otherwise, it would apply a lower state court decision that was not yet final.

Finally, in *Richardson*, the Ninth Circuit held that the district court erred in following the Ninth Circuit's prior decision in the same action as "law of the case," when a Washington state appellate court since had held, in an interlocutory decision, that the Ninth Circuit's prior decision was an incorrect interpretation of Washington law. The Ninth Circuit held that there should be an exception to the "law of the case" doctrine "where there has been a dispositive intervening decision of an intermediate appellate state court." 841 F.2d at 996. The Ninth Circuit, therefore, also follows relevant, non-final lower state court decisions under *West*.[14]

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[14] Various circuit court judges have stated that procedures other than the two outlined above should be followed. For example, Judge Magruder of the First Circuit expressed the view that a stay of federal proceedings might be appropriate until after a pending state supreme court proceeding resolved a critical issue of state law implicated in the federal proceeding. *See In re President and Fellows of Harvard College*, 149 F.2d 69, 72-73 (1st Cir. 1945); *see also Hamme*, 716 F.2d at 154-55 n.4; *Zimmerman v. Mathews Trucking Corp.*, 203 F.2d 864, 867-68 (8th Cir. 1953) ("*Zimmerman*"). There may be other decisions in which federal courts have suggested or granted stays in this situation, but we have found only a few published opinions on this issue.

Circuit courts also have questioned whether certification procedures, if available, must be used in any situation where a state's highest court has not yet ruled on the issue being considered by the federal court. *See, e.g., Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388 (7th Cir. 1992). The Delaware legislature recently has voted to amend the provisions of the Delaware Constitution regarding certification of questions of law to the Delaware Supreme Court. Effective January 28, 1993, the Supreme Court of the United

Thus, decisions of at least four other circuits conflict with the Third Circuit's decision in this case.

Moreover, an earlier decision of the Third Circuit demonstrates that there is a conflict even *within* the Third Circuit concerning whether a relevant, non-final lower state court decision must be considered, in the absence of a high court ruling. In *Hamme*, 716 F.2d at 154, the majority held that the lower state court decision should be followed. In that case, the three judges on the sharply divided panel each favored a different approach to whether deference should be accorded to a lower court decision that was the subject of a petition for *certiorari* to the Pennsylvania Supreme Court: (i) one judge believed that the lower court decision should be followed; (ii) another judge believed that the lower court decision should not be considered; and (iii) the third judge believed that the federal court should wait to rule until the state court decision was final.[15] Yet, in *New Castle VII*, the Third Circuit followed a different procedure—it ignored a non-final lower state court decision.

Thus, there is a conflict among the circuits, and even a conflict within the Third Circuit, concerning whether, under *West* and *Fidelity Union*, the federal courts must consider relevant, non-final lower state court decisions, in situations where the state's highest court has not spoken. The lack of guidance from this Court has resulted in circumstances, such as those in this case, in which a federal

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States, a federal court of appeals of the United States, or a United States district court may certify questions of law to the Delaware Supreme Court. Del. Const. of 1897, Art. IV § 11, *as amended* (1993). At the time *New Castle VII* was decided, Delaware did not permit circuit courts to certify questions of law to the state's highest court.

[15] In an analogous situation, the Eighth Circuit suggested, in *dicta*, that the parties should have made the federal trial court aware of a pending state court case which would be dispositive of the identical issue presented to that court: "The federal District Court should then have been requested to defer its ruling on the motion until the final determination of the [state court] case." *Zimmerman*, 203 F.2d at 868.

court decides to usurp the power of a state court by ignoring, and, therefore, effectively "reversing," a relevant, non-final lower state court decision, for federal but not state litigants. Guidance from this Court is necessary to create uniformity among the circuits, and within the Third Circuit, concerning the procedure to be followed by the federal judiciary when deciding matters of state law not ruled on by the state's highest court, where a relevant, non-final lower state court decision exists.

Petitioner believes that relevant, non-final lower state court decisions should be treated as cases controlled by *West* and its companion cases. Accordingly, this Court should vacate *New Castle VII*, because it is inconsistent with *West*.

CONCLUSION

This Court should provide guidance, and resolve the inter-circuit and intra-circuit conflicts, regarding the proper treatment by federal courts sitting in diversity of relevant, non-final decisions of lower state courts. Thus, the County respectfully requests that a writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the Third Circuit in *New Castle VII*.

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February 16, 1993